ABD HAMID SAAD

v.

ALIYASAK ISMAIL

HIGH COURT MALAYA, ALOR SETAR
ALAUDDIN SHERIFF J
[CIVIL SUIT NO: 20 OF 1979]
21 JUNE 1998

LAND LAW: *Sale of land - 'Jual janji' agreement - Contract provided for retransfer of land upon repayment of loan amount - Whether term enforceable - Whether outright sale - Whether a conditional transfer - Whether registered owner's title defeasible - National Land Code 1965, s. 340*

LAND LAW: *Indefeasibility of title and interests - Registered owner - Title obtained under 'jual janji' agreement - Agreement provided for retransfer of land upon repayment of loan amount - 'Operation of law' - Whether title defeasible - National Land Code 1965, s. 340*

CIVIL PROCEDURE: *Locus standi - Action to enforce 'jual janji' agreement - Land transferred to defendant on condition it was to be retransferred upon repayment of loan amount - Plaintiff's late mother the transferor - Whether plaintiff had locus to bring action*

CONTRACT: *Time - Time of the essence - New agreement entered into after expiry of first agreement - Whether time of the essence*

CONTRACT: *Privity - Equity of redemption - 'Jual janji' agreement - Original agreement between plaintiff's mother and defendant - Land transferred to defendant on condition it was to be retransferred upon repayment of loan amount - Whether plaintiff could enforce agreement*

LIMITATION: *Recovery of land - "Jual janji" - Accrual of cause of action - Limitation Act 1953, s. 9(1)*

EVIDENCE: *Documentary evidence - Agreed bundle - Agreements referred to in course of trial*

Pursuant to a 'jual janji' agreement dated 27 April 1966 ('the first agreement'), the plaintiff transferred certain land to the defendant in consideration of RM2,770 with the understanding that the defendant would retransfer the land to the plaintiff on repayment of the sum of RM2,770 within three years. The plaintiff alleged that by an agreement dated 27 January 1972 ('the second agreement'), the defendant agreed to extend the time for the plaintiff to repurchase the land by a further three years from 27 January 1972 in

consideration of the plaintiff paying RM3,770. However, the plaintiff alleged that despite making repayment of the RM3,770 and several demands for the retransfer of the land, the defendant had refused to do so.

The defendant alleged that the sale of the land was an outright sale, but admitted agreeing to retransfer the land to the plaintiff upon repayment of RM2,770 within three years. He however denied the existence of the second agreement and argued that: (1) the plaintiff's claim was statute-barred; (2) the plaintiff had no *locus standi* as the land had been registered in the plaintiff's mother's name; and (3) he had an indefeasible title to the land.

Held:

[1] The defendant was untruthful in his denial of the second agreement. From the evidence, the defendant had in fact executed the second agreement and had attempted to obtain RM10,000 from the plaintiff for the retransfer of the land.

[2] The conduct of the parties in entering into the second agreement after the expiry of the first agreement meant that time was no longer of the essence and the period for retransfer of the land was extended until the expiry of the second agreement on 27 January 1975.

[3] The fact that the defendant had been the registered owner of the land for more than 30 years but had never been in possession of the land nor received any rents and profits from it, whereas the plaintiff had, showed that the land was merely security for a loan.

[4] Time does not run until a cause of action becomes vested in a plaintiff. In land recovery matters, s. 9(1) of the Limitation Act 1953 provides for a 12-year limitation period from the date of accrual of the right of action. The two relevant dates were 28 April 1969 and 28 January 1975, following the expiry of the two agreements. As the plaintiff's action was filed in 1979, he was not barred by limitation which would only set in either in 1981 or 1987.

[5] The transfer to the defendant was a conditional transfer and not an outright sale. The first agreement was expressed to bind the parties' heirs, and as a beneficiary of his late mother, the plaintiff had the necessary locus. Furthermore, the plaintiff was privy to the second agreement which was between the plaintiff and defendant, and was aggrieved by the defendant's refusal to honour it.

[6] Although the agreements were not tendered as exhibits, they were referred to by both parties during examination of the witnesses. The first agreement also formed part of the agreed bundle of documents, and became part of the evidence when it was referred to by the parties. Although the second agreement was in the disputed bundle of documents, it had also been referred to during the proceedings and the court had no doubt as to the truth of its contents.

[7] The indefeasibility of title under s. 340(1) of the National Land Code ('the Code') was subject to certain exceptions, one of which was 'operation of law' under s. 340(4)(b). That term has been interpreted as being enacted for the purpose of dealing with fact patterns that did not fall squarely within the other exceptions. Since there was an obligation on the defendant to retransfer the land to the plaintiff by virtue of the two agreements, and also by law or in equity, the defendant's title was defeasible by reason of s. 340(4)(b) of the Code.

[Plaintiff's claim allowed with costs.]

Cases referred to:
Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 ***(foll)***
Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(foll)***
Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286 ***(refd)***
Krishnadas Achutan Nair & Ors v. Mariyam Samykano [1997] 1 CLJ 636 ***(foll)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 ***(foll)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Husin [1997] 3 CLJ 854 ***(foll)***

Legislation referred to:
Limitation Act 1953, ss. 9(1), 10(1), (4)
National Land Code 1965, s. 340(2), (4)(b)

For the plaintiff - C Navaratnam; M/s Mathuram & Co
For the defendant - Ku Abdul Rahman; M/s Aziz Zakaria Shaiful & Wan

Reported by Anne Khoo

JUDGMENT

Alauddin Sheriff J:

Pursuant to a 'jual-janji' agreement in writing dated 27 April 1966 (first agreement) the plaintiff transferred his land comprised in SPK No. 9332, Lot No. 2051 Mukim Keplu, Kubang Pasu Kedah in area 4r. 340j. (the said land) to the defendant in consideration of the sum of RM2,770 and on the defendant retransferring the said land to the plaintiff on repayment of the said sum of RM2,770 within three calendar years from the said date ie, 27 April 1966.

By a supplementary agreement (second agreement) in writing dated 27 January 1972 the defendant agreed to extend the time for repurchase of the said land by the plaintiff for a further period of three calendar years from 27 January 1972 in consideration of the plaintiff paying an increased sum of RM3,770.

Since the month of January 1975 the plaintiff has made several demands to the defendant to transfer the said land to him but the defendant has refused to comply with the said demand.

The plaintiff is therefore left with no alternative but to file this suit.

The plaintiff's contention is that since both agreements are 'jual-janji' agreements, the defendant, in accordance with the terms of the agreements is obliged to execute a retransfer of the said land upon repayment of the sum of RM3,770 (see para 1 second agreement) to the defendant within the said three year period from the second agreement.

The defendant on the other hand argued that it was an 'outright sale' for a consideration (loan) of RM2,770 to the plaintiff or his (plaintiff's) mother, Samsiah bt. Mat Isa. The defendant admitted that if the said loan were paid within three years from the first agreement, the said land would be retransferred to the plaintiff. The defendant however denied the existence of the second agreement or ever executed such.

Further, it was argued by the defendant that:

(i) the plaintiff's claim is statute-barred;

(ii) the plaintiff has no interest in the said land and therefore has no *locus standi* and is not an aggrieved party.

(iii) the defendant has an indefeasible title to the said land.

Issues

(1) Whether The Agreements Constitute A 'Jual-janji' Transaction

What is the duty of the court in construing a written contract?

It was held by the Court of Appeal in *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn. Bhd.* [1997] 1 MLJ 587 as follows:

> That the role of the Court in upholding agreements adverted to by Lord Wright is not confined to documents drafted by laymen and includes those prepared by lawyers was recognised by Gibbs J (as he then was) in *Australian Broadcasting Commission v. Australasian Performing Rights Association Ltd.* [1973] 129 CLR 99.

He said (at p. 109):

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another ...

Having construed both agreements here, I am left with no doubt whatsoever that the parties had intended both to be 'jual-janji' agreement.

Clause 2 of the first agreement states as follows:

> ... the First Party hereby declares and agrees to sell back outrightly the abovementioned bendang land to the Second Party or to Abd. Hamid bin Saad (NRIC No. 3212246) her son ...

Further, cl. 1 of the second agreement states:

> ... The First Party agrees to extend the period of repurchase of the said land for 3 years from the date of this agreement onwards ...

In his evidence the plaintiff had stated that pursuant to the second agreement he has made an effort to exercise his contractual rights to pay the sum of RM3,770 within the period of three years as stipulated in the second agreement but the defendant refused to accept the same but instead demanded the sum of RM10,000 for retransfer of the said land.

I do find it as a fact that the plaintiff was always able and willing to pay to the defendant the sum of RM3,770 as agreed but for reasons best known to him the defendant had refused to accept the same, an act which is contrary to the terms of the second agreement. To my mind, the defendant's refusal to accept the plaintiff's tender of RM3,770 would raise the inference that the defendant had all along intended to demand RM10,000 instead. It would not be unreasonable to suggest that the defendant's action is a ploy to avoid retransferring the said land to the plaintiff as he knew that the plaintiff would be in no position to raise the amount of RM10,000.

Of course the position would have been altogether different if the plaintiff has chosen not to exercise his rights to repurchase the said land in which case the defendant would have an equitable right to secure the said loan by being registered as owner of the said land (See *Mahadevan & Anor v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 MLJ 266).

There is another matter which I need to consider here ie, is time the essence of the contract? Originally, time was the essence of the contract. However after the expiry of the first agreement and through the conduct of parties in entering into the second agreement time had been allowed to pass and it was no longer the essence of the contract. The second agreement showed that time was intended to be extended until 27 January 1975.

One other factor which deserves consideration is this. In his evidence the defendant stated that he was the owner of the said land but admitted that over the period of thirty one years he in fact did not have possession of the said land. It was the plaintiff who had been in possession of the said land and receiving rents and profits all these years. It is therefore inconceivable that the defendant who claims to be the owner of the said land is not in possession of it nor receiving rents and profits. These circumstances only go to show in fact all that the defendant has is in reality a 'jual-janji' agreement which he is holding as security for a loan.

(2) Defendant's Denial Of The Second Agreement

According to the defendant he had never executed the second agreement. When he was shown the second agreement, in court, he denied it was his signature. But it was in evidence (and never denied by the defendant) that the defendant's then solicitors Messrs. Naughton Christie had sent a notice dated 27 January 1975 to the plaintiff's solicitors demanding payment of RM10,000 for the retransfer of the said land to the plaintiff.

Incidentally, 27 January 1975 is also the date for the expiry of the second agreement. I hold the view that it is highly improbable for the date in the said notice to be coincidentally similar to the date of expiry of the second agreement unless of course the defendant knew all along about the second agreement. Here, I do not think the defendant is telling the truth. I therefore hold that the defendant did in fact execute the second agreement.

(3) Is The Plaintiff's Claim Statute-barred?

The plaintiff's claim here is in the nature of an action for recovery of land.

Section 9(1) of the Limitation Act 1953 states:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the **right of action accrued** to him, or if it is first accrued to some person through whom he claims, to that person.

And s. 10(1) states:

> Where the person bringing an action to recover land or some person through whom he claims has been in possession thereof and has, whilst entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the **dispossession or discontinuance**.

And s. 10(4) states:

> A right of action to recover land by virtue of a forfeiture or breach of condition shall be deemed to have accrued on the date on which the forfeiture was incurred or the **condition broken** ...

The words 'the right of action accrued', 'dispossession or discontinuance' and 'condition broken' appearing in s. 9, 10(1) and 10(4) of the Limitation Act 1953 respectively go to show that the proposition is that statutes of Limitation do not begin to operate unless a cause of action becomes vested in the plaintiff.

In *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26, the learned Gopal Sri Ram, JCA had this to say (at p. 37):

> It is convenient to begin with the proposition that statutes of limitation do not begin to operate unless a cause of action becomes vested in the Plaintiff. In the words of Sir Binod Mitter in *Bolo v. Koklan* AIR [1930] PC 270 at p. 272.
>
> There can be no 'right to sue' until there is an accrual of, the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

Adverting to the facts of the present case, when does the cause of action accrue? There are in fact two dates ie, 28 April 1969 (following the first agreement) and 28 January 1975 (following the second agreement). Since the plaintiff has filed this action in 1979 he is therefore not caught by the limitation period which will only become effective either in 1981 or 1987.

(4) Does The Plaintiff Have An Interest In The Said Land And Therefore Has Locus Standi And Is An Aggrieved Party

It is the defendant's contention that as the said land was registered under the name of Samsiah @ Thalasiah bt. Mat Isa (plaintiff's mother) prior to 27 April 1966 and as after the said even date the said land was transferred to the defendant, the plaintiff's beneficial interest (if any) was accordingly cut off.

With the greatest of respect to the defendant I must say that this argument is unsustainable.

a It must be borne in mind that the transfer of the said land to the defendant is a conditional transfer and is by no means, an outright sale. Therefore the plaintiff has all the right to bring this action under his name. Further, the first agreement provides that it binds the heirs ie, the plaintiff. As beneficiary of Samsiah the plaintiff has the right to be heard in court.

b In addition, the second agreement is without doubt between the plaintiff and the defendant which means that the plaintiff is privy to the said agreement. Since the defendant had refused to retransfer the said land after the plaintiff had taken efforts to pay the money owned, the plaintiff therefore can be classified as an aggrieved person.

c In *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Husin* [1997] 3 CLJ 854 the Court of Appeal held that the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a *d* person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved person is never closed.

In the present case, it is clear that the plaintiff is an aggrieved person as his interest is adversely affected by the wrongful act of the defendant in refusing *e* to retransfer the said land to the plaintiff. The plaintiff has beneficial interest in the said land by reason he is the son of Samsiah @ Thalasiah bt. Mat Isa, deceased, and further he has *locus standi* in this action as he is privy to the second agreement which is linked to the first agreement.

f It was further contended by the defendant that since both agreements were not tendered as exhibits they are inapplicable and should not be taken into consideration by this court.

It is not disputed that both agreements were referred to by both parties during examination of witnesses. It is also not disputed that the first agreement is *g* an agreed bundle of documents.

With regard to 'agreed bundle of documents' the learned Peh Swee Chin, FCJ (as he then was) in *Jaafar bin Shaari and Anor v. Tan Lip Eng & Anor* Federal Court Civil Appeal No. 04-4-92 made the following observations:

h (i) An agreed bundle of documents does not require proof as to authenticity by calling of the makers.

(ii) Unless the contrary is indicated directly or indirectly the truth of the contents of an agreed bundle is always not admitted.

i

(iii) the documents in an agreed bundle do not *ipso facto*, become part of the evidence of the case unless during the examination of witnesses, or during submission, or the Court's own volition it is read or referred to before the conclusion of the case.

(iv) The truth of the contents of the documents remain a matter for the Court to decide and likewise the question of weight to be attached to the documents remains at large.

Applying the third observation (above) I will respectfully say that although the first agreement was not tendered as an exhibit, it has become part of the evidence of the case by reason of it being referred to during the examination of witnesses.

With regard to the second agreement (which is in the disputed bundle of documents), I would also say that it has become part of the evidence of the case by reason that it was read or referred to before the conclusion of the case, even though the defendant had disputed the truth of the contents. I have personally read and referred to the second agreement and I must say, with respect, that I have no doubt as to the truth of the contents.

Does The Defendant Have An Indefeasible Title To The Said Land?

It is the defendant's contention that he has indefeasible title to the said land by reason that the plaintiff has not shown there was fraud or other elements as stated in s. 340(2) of the National Land Code 1965 on the part of the defendant.

Section 340 of the NLC reads this:

340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy.

or

(b) where registration was obtained by forgery or by means of an insufficient or void instrument.

or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2).

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent.

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law

The term 'operation of law' in s. 340(4)(b) NLC was referred to and discussed in *Krishnadas a/l Achutan Nair & Ors v. Mariyam a/l Samykano* [1997] 1 MLJ 94 where the Federal Court held:

> In *Ong Chai Peng & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224, a case decided under the Land Code, Gill FJ (as he then was) when applying the decision in *Yong Joo Lin* said (at p. 232)
>
> The term 'operation of law' in sub-s. (iv) as Das on *Torrens System in Malaya* points out at p. 235, is a generic term deliberately used by the legislature to grant relief in cases where contractual or conscientious obligations (importing a breach of duty of which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity.

Further down the Federal Court continued:

> In our judgment, Parliament enacted s. 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s. 340 of the Code.

Coming back to our case, since there exists an obligation on the part of the defendant to retransfer the said land to the plaintiff by virtue of both agreements and further that obligation is imposed on the registered proprietor either at law or in equity I hold that the defendant's title to the said land can be defeasible by reason of s. 340(4)(b) NLC.

Based on the foregoing reasons and authorities I would allow the plaintiff's claim in respect of prayer (1) and costs.